

# Book Review

## Technology, Democracy, and the Manipulation of Consent

*When Government Speaks: Politics, Law, and Government Expression in America.* By Mark G. Yudof. Berkeley: University of California Press, 1983. Pp. xvi, 323. \$28.50.

*Technologies of Freedom.* By Ithiel de Sola Pool. Cambridge: Belknap/Harvard Press, 1983. Pp. 299. \$20.00.

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The critical problem for contemporary First Amendment theory is the unequal access that wealth can buy. Through its guaranty of free expression, the First Amendment supposedly protects the right of each individual to communicate his or her ideas. But as the Supreme Court recognized a few years ago, "virtually every means of communicating ideas in today's mass society requires the expenditure of money."<sup>1</sup> As we enter an age in which all aspects of communication are dominated by privately owned mass media in general and the modern electronic media in particular,<sup>2</sup> the difficulties grow more obvious and less tractable.

We live in a nation founded on the conceit that everyone ought to have a say in policymaking. The final authority of government is supposed to rest with the people. But that authority cannot be exercised—at least not very well—unless people have available to them all the information they

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1. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

2. As I shall use the terms in this Review, "mass media" or "communication media" refers to all available means, especially those privately owned, of distributing a message to a large number of recipients. The term "electronic media," although it has special reference to broadcasting and cablecasting, refers generally to all electronic means of transmitting messages.

need to make up their minds. Traditionally, the First Amendment has been considered an aid in the public's quest to learn all that it can about the day's vital issues. Were the resources of communication not so scarce, that model might even be accurate. But those resources *are* scarce. Not every message can reach an audience; not every question can be debated. To select the messages for transmission, we have relied mainly on the market, but the rise of the electronic media has laid bare what should always have been obvious. Since the necessary resources are scarce, those willing and able to pay have the ability to spread their messages. Those who lack the money lack the access to do the same; their principal First Amendment right is to listen.<sup>3</sup>

The messages they hear are, for the most part, uncritical of the status quo. When there is criticism, it is usually delivered in a tone of righteous indignation, a kind of "This-shouldn't-happen-in-America" approach, which in turn reinforces the idea that changes should come about only within the system. Bad government or bad corporate policies are portrayed as the result of bad people, not of a bad system. One may concede the validity of this message,<sup>4</sup> yet quarrel with a method of controlling mass communication media which ensures that no other message is likely to be heard.<sup>5</sup> How are the people to govern if their major sources of information give them only part of the story?

It is true that people cannot be forced to be responsible, and it is only occasionally moral to impose on others one's own sense of responsibility. But we do not face a situation in which the public makes a conscious choice not to be informed. We face instead one in which a real choice is rarely offered.<sup>6</sup> The electronic media, which have the potential to provide so much information, also have the awesome power to edit or censor or bias the information that they deliver. This in turn can alter world views and lay to waste the processes by which the system is supposed to take account of the consent of the governed. The widely shared public intuition

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3. Ironically, this hazard looms even as the dawn of the information age promises to make available to more people more information than ever before. See Patterson, *Television and Election Strategy*, in ACADEMY OF POLITICAL SCIENCE, *THE COMMUNICATIONS REVOLUTION IN POLITICS* 248, 250 (1982) ("[T]hese trends will provide more information for those who want it . . . . Unfortunately, many people may end up knowing less.").

4. Though the message affirming the goodness of the system is not above criticism, citations to criticisms of its goodness would surely be gratuitous.

5. The First Amendment is not generally considered to embody a right to be heard. See, e.g., *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (no right to send mail to individual not wishing to receive it); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (no right to use "loud and raucous" amplifier of speech).

6. Sometimes, of course, the views of those without substantial economic resources *are* presented in the media, usually as news stories. But it is important to bear in mind that such presentations are a matter of *grace*, not a matter of *right*. See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973).

is correct: The media *are* doing something to us.<sup>7</sup> One of the things the media are doing is teaching us values; this in turn influences the way our democracy functions. The mass media do have some power to shape people's views, whether about the products that they should purchase or about the politicians for whom they should vote.<sup>8</sup> Should anyone be so bold as to assert the contrary, then I think, as Charles Black has written in quite a different context, "we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter."<sup>9</sup> The socializing power of the mass media is a serious problem and is not going to vanish. Moreover, it presents a threat to democracy as we have come to know it,<sup>10</sup> and for that reason, we cannot afford to ignore it.

As a society, we do not quite ignore it. In the United States, where those things perceived as dangerous are usually regulated, broadcasters, at least, have come to be viewed as exercising a quasi-public function: profiting from their use of a scarce public resource (the airwaves) and therefore acting as "public trustees." Thus, the Supreme Court has said that the electronic media may be regulated "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."<sup>11</sup> This regulatory solution is a compromise and it has been a controversial one. But it is not easy to work out solutions that do not run roughshod over the First Amendment. Appointing a "media czar" of some sort, charged perhaps with ensuring that programming does not distort the mechanism of democracy, would invite totalitarian disaster. On the other hand, the public's fears of the power of the media are not wholly irrational. Left completely unregulated, the modern media could present serious threats to democracy. No concrete and convincing solutions to the dilemma have yet been proposed.

It is against this background that two recent books about mass communication in a democracy ought to be considered. One is Mark Yudof's *When Government Speaks*;<sup>12</sup> the other is Ithiel de Sola Pool's *Technolo-*

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7. Of course, different people have different ideas on just what it is that the mass media are doing. Views range from the long-time contention of critical theorists writing from the left that the mass media deaden the consciousness and indoctrinate the public with an ideology that makes it impossible for individuals to recognize their own repression, see H. MARCUSE, *ONE-DIMENSIONAL MAN* (1964), to a general fear that by exposing young children prematurely to the problems of the adult world, the media are making it far more difficult to inculcate traditional values. See N. POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 81-119 (1982).

8. See *infra* pp. 588-91 & note 44. For a rather polemical statement of the opposite view, see Karp, *The Lie of TV's Political Power*, *CHANNELS*, May-June 1983, at 37.

9. Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).

10. See *infra* pp. 601-05. Of course, one may concede the threat to democracy and yet deny the need for regulation of media content. See Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 *SUP. CT. REV.* 223, 257-61.

11. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). For a description of the most important doctrines promulgated to regulate broadcast content, see *infra* note 69.

12. M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983) [hereinafter cited by author and page num-

*gies of Freedom*.<sup>13</sup> In the interaction of technology, media, and regulation, both authors see significant threats to democracy as most of us understand it. Both books represent earnest and painstaking efforts at finding ways to counter those threats. But neither Professor Yudof nor Professor Pool spends much time considering the threat posed when access to information is controlled not by the government but by those private interests able to spend enough money to purchase access for their points of view. Since neither Professor Yudof nor Professor Pool sets out to solve this problem, neither really offers a solution. Yet, as I shall argue in the pages to follow, a careful synthesis of the two may permit us to begin to find one.

# I. THE FIRST THREAT: GOVERNMENTAL DOMINATION OF COMMUNICATION

The danger Professor Yudof discerns and wants to prevent is set out near the beginning of his book:

The expansion of government at all levels has increased its opportunity to communicate with the populace . . . . Technology has also contributed to the growth of government, creating more opportunities for government involvement and at the same time supplying the tools needed to govern on a larger scale. Among the most important tools are the mass media that provide direct access to the minds and attention of citizens . . . . The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals. The opportunities for such abuse are numerous.<sup>14</sup>

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ber only]. Much of the analysis in *When Government Speaks* was first presented in Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

13. I. POOL, *TECHNOLOGIES OF FREEDOM* (1983) [hereinafter cited by author and page number only].

14. M. YUDOF at 6. After stating his thesis, Professor Yudof runs headlong into a significant obstacle: the lack of social science evidence that such abuse has occurred, or (if it has occurred) that it has had any significant impact. *See id.* at 71-89. This obstacle has led one reviewer to comment: "Yudof significantly contributes to the literature by demonstrating at length that there is no ground for any general fear that government has the power to dominate the marketplace of ideas enough to falsify consent. His demonstration will persuade almost everyone. Except Yudof." Shiffrin, *Government Speech and the Falsification of Consent* (Book Review), 96 HARV. L. REV. 1745, 1748 (1983).

Professor Shiffrin's criticism notwithstanding, the obstacle may be significant, but it is not insurmountable. The fact that the danger has not made itself manifest does not mean that the danger does not exist. *Cf.* I. ASIMOV, *FOUNDATION* 163 (1951) ("Any fool can tell a crisis when it arrives. The real service to the state is to detect it in embryo."). The major flaw in Professor Yudof's analysis is not that he tries to resolve a crisis that is at most embryonic, but rather that while plunging ahead to limit government speech in spite of the lack of evidence to support the danger, he shies away from trying to limit powerful private speech because of the lack of evidence to support the danger. *See infra* pp. 587-89.

The government's superior access to the communication media is an important problem; trying to find a solution is a risky task. Professor Yudof's resolution of the problem is ambitious and creative: He proposes a right of citizens to sue either to enjoin government expression or to gain a right of reply when that expression has the effect of "falsifying majorities," which is to say, when the government communication "distorts the judgment of citizens, advocates undemocratic or unconstitutional values, violates the right of citizens not to be called upon to pay taxes to support expression they find objectionable, or drowns out opposing messages by virtue of the government's ability to capture the listening audience."<sup>15</sup> In the usual case, the litigant "would be attempting to vindicate the interest of all citizens" in protecting their right to make informed judgments unmanipulated by the government.<sup>16</sup> In short, Professor Yudof recommends judicial enforcement of what might be called a "right to democracy."

This is heady stuff, and those who are already fearful of judicial power will no doubt cringe: Not only can the courts tell the government what to do and not to do, but under this proposal, they would even be able to tell the government what to say and not to say. Professor Yudof settles on this proposal only after a fascinating odyssey through work in several disciplines and only after considering and rejecting other means for accomplishing his end—denying government the power to manipulate our minds. One may quarrel with his goal, but if one grants its legitimacy, it is not easy to fault his analysis. In the following pages, I shall suggest not that his answers are wrong, but rather that he fails to take them as far as he should.

Professor Yudof makes a powerful case that the government does indeed have many opportunities to control the flow of information to the public or the way in which the public views the information in its possession.<sup>17</sup> It is not likely that anyone has doubts on this point, but if doubts exist, Professor Yudof's careful review should assuage them. Having set forth the ways in which the government can manipulate public opinion, he moves on to explain in some detail why this poses a threat to the pluralist democracy that he envisions as the ideal. Critical to his view is the idea that consent means something more (or less) than consensus.<sup>18</sup> His model values "the *opportunity* of citizens, groups, or organizations to influence those who govern and one another."<sup>19</sup> He agrees with Alexander Meiklejohn that freedom of speech represents a crucial element in the

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15. M. YUDOF at 204.

16. *Id.* at 204–05.

17. *Id.* at 51–66. Although he considers the point somewhat unclear, Professor Yudof apparently believes that the existence of mass communication media exacerbates the problem. *Id.* at 89.

18. *Id.* at 152–54.

19. *Id.* at 154 (emphasis added).

process of "verification of majorities"—in discovering what the people really think.<sup>20</sup> But he adds what Meiklejohn failed to consider:

There is the danger that the prestige and status of government will give its utterances an advantage in competition with private-sector communications. There is the danger that government will fail to disclose vital information only it possesses. And, most importantly, there is the danger that citizens will not perform their self-governing functions because the government itself has indoctrinated them to its point of view.<sup>21</sup>

He concludes that all branches of the federal government<sup>22</sup> are potential abusers of their power and might participate in this "falsification" process, the engineering of consent to government programs through manipulation of information. The courts are his chosen branch for discovering and reining in falsification,<sup>23</sup> but he admits that executive officials who are prepared to mislead the public might not blink at the idea of ignoring or evading a judicial decree. Thus congressional action of some sort might also be necessary.<sup>24</sup>

The gist of Professor Yudof's argument, then, is this: The potential evil of government indoctrination is so great that the First Amendment ought to be turned into a shield to protect from that indoctrination the processes of discussion and consent, processes crucial to the continuing vitality of pluralist democracy. So far, so good. Professor Yudof is a bit vague about many of the details of his proposal,<sup>25</sup> but that is to be expected. As with so many new and unusual proposals, the book is largely food for thought.<sup>26</sup>

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20. *Id.* at 154-55. See A. MEIKLEJOHN, *FREE SPEECH* 3-19 (1948).

21. M. YUDOF at 156.

22. While Yudof concentrates on the executive branch's speech, he also devotes specific attention to Congress, *id.* at 179-90, and the Supreme Court, *id.* at 190-99. He believes his analysis applies to state legislatures and courts as well. *Id.* at 179.

23. *Id.* at 200-07. Professor Yudof does not completely discount the role that other organs of government may play, but he clearly considers the courts best suited for the task. See *id.* at 178-99.

24. *Id.* at 190. This congressional pressure is part of the system of checks and balances that will, in Professor Yudof's view, help alleviate the problem of government manipulation of consent. See *id.* at 200-07.

25. To take just one example, Professor Yudof discusses in some detail *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973), in which the court ordered a local government to grant a private group the right to reply to notices issued by a public school committee. The *Bonner-Lyons* result cries out for a principled basis—and Professor Yudof's theory could provide one. Yet Professor Yudof equivocates on whether he considers *Bonner-Lyons* correct. See M. YUDOF at 298-99. If he is unwilling to embrace *Bonner-Lyons*, then it is not clear whether his theory goes substantially beyond current case law. See also *infra* note 26 (discussing explanatory power of Yudof's thesis).

26. Even in its present form, the thesis does possess a healthy degree of explanatory power. For example, by using this hypothesis on the limitation of government power to manipulate the flow of information, Professor Yudof manages to place on a principled footing a number of cases which, despite their appealing results, are not easy to tie to the Constitution and the Court's own precedents. For example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish may decline, on religious grounds, to comply with state compulsory education law), is an important case which the Court recently sought to

No doubt others will comment on it, offering suggestions for modification, and Professor Yudof will certainly have more to say. But his theory still raises a question: What about *private* efforts at manipulating public opinion in order to falsify consent? Professor Yudof writes these out of his theory a bit too quickly.

The problem begins with his discussion of pluralism. He is careful to take note of the emergence in recent years of a large number of attacks on "the pluralist faith" by critics who have labeled pluralism either immoral or unattainable.<sup>27</sup> For the most part, Professor Yudof's responses follow a simple line: "[T]he answer to these criticisms is not less pluralism, but more."<sup>28</sup> His general view is that for all its faults and for all our failures to meet its ideal, pluralism is the best available theory of democracy.<sup>29</sup> In reforming the system, he argues, we should concentrate on bringing it closer to this ideal.<sup>30</sup>

He might even be right, but if he is, then it is curious that he dismisses so readily contentions such as Professor Lindblom's that in the interplay of public argument needed to make pluralism work, large, wealthy corporations have an enormous advantage over everyone else when it comes to getting their messages across.<sup>31</sup> Professor Yudof responds to that argument in this way:

That most citizens believe in free enterprise or private property does not necessarily mean that this is a result of corporate indoctrination.

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limit, *see* *United States v. Lee*, 455 U.S. 252 (1982), probably because of its potential scope. Yoder "rests on a number of related factors" important to Professor Yudof's theories, foremost among them "the need for pluralism, the dangers of state indoctrination, the potential for state interference with the consent of the governed, the rights of parents to socialize their children as they see fit, and the power of teachers as communicators, given the respect with which they are treated." M. YUDOF at 231. Similarly, Professor Yudof is able to explain (with obvious reluctance) *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), in which the court ruled that college newspaper editors could not be prevented by the college from spreading inflammatory segregationist propaganda—even though the college owned the newspaper. Although troubled by *Joyner*, Professor Yudof concludes that it can best be supported "by a policy of limiting the impact of government speech," because "[e]ditors, like teachers, ought not to be turned into unwilling conduits of government indoctrination—even in so important an area as policy on racial discrimination." M. YUDOF at 219–20. If one agrees with Professor Yudof's initial goal of limiting the ability of government to falsify consent, then this is a logical move; and it has the happy virtue of explaining as well why government-as-employer is unable to restrain the classroom speech of teachers-as-employees. *Id.* at 216. "If teachers were required to be automatons and to adhere rigidly to lesson plans and assignments of material promulgated by a central authority, the capacity to indoctrinate to a single ideological point of view would be increased." *Id.*

27. *See, e.g.,* C. LINDBLOM, *POLITICS AND MARKETS* (1977); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968). Among the better-known critiques that Professor Yudof cites but does not address directly are H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961), and T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979). *See* M. YUDOF at 91 n.3.

28. M. YUDOF at 95.

29. *Id.* at 109. Again, he relegates to a footnote two of the most articulate critics of this view, this time Laurence Tribe and Mark Tushnet. *Id.* at 109 n.52.

30. *Id.* at 109.

31. C. LINDBLOM, *supra* note 27, at 201–13.

There may be all sorts of socializing influences; these beliefs may simply be a by-product of other socializing forces. This is a chicken-and-egg problem, to which Lindblom gives no satisfactory answer . . . .<sup>32</sup>

He adds: "That corporate interests have sometimes triumphed does not mean that every triumph was a blow to other interests, or that corporate interests must always triumph."<sup>33</sup>

I am not sure that either of these is really an answer to what Professor Lindblom has to say. Both Professor Yudof and Professor Lindblom are seeking to explain the same phenomenon—the broad American acceptance of doctrines that have the effect of increasing the concentration of corporate wealth—and it may simply be that their intuitions on a possibly unprovable point are different. However, Professor Lindblom's argument is stronger than Professor Yudof seems to believe. The "socializing influences" to which Professor Yudof makes reference must originate *somewhere*. I think that Professor Lindblom's argument is not so much that corporations by themselves conspire day after day to socialize America to their advantage,<sup>34</sup> but rather that our socialization into liberal democratic theory—including acceptance of the basics of market theory, private property, and the profit motive—has created an atmosphere in which members of society and large corporations will perceive their long-run interests as substantially identical. A corporation might lose today or tomorrow on a particular point of environmental law or securities regulation, but that has no effect on whether most Americans would agree that the corporation has the right to survive and make money. Moreover, there is no real forum for those who view capitalism as evil rather than good—at least not if they want to reach a substantial number of people with their views.

Professor Yudof does wade through much of the literature on the effects of mass communication media on listeners and viewers,<sup>35</sup> and he concedes that private interests, in the same way as government, probably do "often attempt to manipulate the processes of consent" and that "such efforts may not be wholly unavailing."<sup>36</sup> He takes explicit note of what he calls the "polemical" view that there exists "a false consciousness which allows individuals to be repressed without their being aware of it."<sup>37</sup> He does not so much refute this view as dismiss it as too pessimistic:

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32. M. YUDOF at 101.

33. *Id.* at 103.

34. *But see infra* note 44 (citing evidence of overt efforts to do this).

35. M. YUDOF at 71-89.

36. *Id.* at 89.

37. *Id.* at 86. *See* H. MARCUSE, *supra* note 7, at 1-18.



[T]he real weakness in the polemicists' ideological view of government communication, culture, politics, economics, and the mass media (apart from the absence of empirical support for their suppositions about the communications powers of government and business leaders) is that in erecting a structure to explain public and elite acquiescence to things as they are, they have largely destroyed the hope for change . . . . What will enable the individual to overcome his own mind-set . . . ? In the absence of a cataclysmic national crisis of war or depression, why should people who think they are free, who think that they are making choices, and who think that fundamental American values are sound, reject their political, social, and economic arrangements?<sup>38</sup>

If Professor Yudof is correct in his assessment of these arguments, he may be pointing less to a weakness in them than to one in the system: If the "polemicists" are correct, then there is no possibility of reform *within the system*. That is not the same as saying that there is no chance of reform at all. It only means that the system is the problem, not the solution.

The more important point to draw from all this, however, is somewhat different. If, as Professor Yudof contends, there is little satisfactory evidence to demonstrate how minds are molded, then his entire argument on government manipulation proceeds from the *suspicion* or *intuition* that it *could* happen and that if it did, pluralist democracy would be threatened. By the same reasoning, there is no basis for rejecting the possibility of mind-molding by private interests merely because the evidence is not firm. The suspicion or intuition that it could happen ought to be enough to spark analysis.<sup>39</sup> If falsification of consent threatens democratic values, then it ought not to matter who does the falsifying.

I stress this point because it is crucial to understanding both what Professor Yudof says subsequently and why his analysis should be carried further. Since he is able to dismiss from consideration the power of private interests to manipulate public opinion, he has little trouble making the argument that unrestrained government speech poses the greatest threat to the pluralist ideal. His reasoning from that point on is quite cogent, but it is occasionally overshadowed by the omission.

Even if Professor Yudof, in his admirable effort to restrict government power to falsify consent, too quickly dismisses private power to do the same thing,<sup>40</sup> he is hardly alone in this quick dismissal. In *Buckley v.*

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38. M. YUDOF at 88.

39. The suspicion can be combined with the evidence that opportunities exist and that attempts are sometimes made to exploit them. See *infra* pp. 601-04.

40. See Shiffrin, *supra* note 14, at 1753 ("Yudof's zeal for protection against government speech ultimately blinds him to the dangers of corporate speech.") (footnote omitted).

Valeo<sup>41</sup> and *First National Bank of Boston v. Bellotti*,<sup>42</sup> the Supreme Court served notice that it will not lightly countenance restrictions on the spending of money to influence public opinion, notwithstanding the power which that approach concentrates in the hands of the wealthy and those with access to wealth.<sup>43</sup> If the Court's position is that public opinion is not shaped by those with money to spend, then the Court, like Professor Yudof, is probably wrong.<sup>44</sup> If instead the Court's position is that the First Amendment takes no notice either of inequality in wealth or of the differential access to media which that inequality can cause, then, as my father is fond of saying, "That's their story and they're stuck with it." But even if the Court is stuck with its answer, the rest of us may not be. To understand why, it is necessary to turn to the work of Professor Pool.

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41. 424 U.S. 1 (1976). *Buckley* resolved a variety of challenges to the constitutionality of the Federal Election Campaign Act of 1971 and its 1974 amendments. Its most relevant holdings for present purposes involved the Act's limits on campaign contributions and expenditures. The Court upheld limits on contributions as sufficiently focused efforts to prevent corruption or the appearance of corruption. *Id.* at 28-29. The Court noted that one of the "'ancillary' interests" of these provisions was to "mute the voices of affluent persons and groups in the election process." *Id.* at 25-26. The Court struck down limits on individual expenditures independent of a candidate's wishes as unconstitutional restrictions of First Amendment guaranties, *id.* at 44-51, specifically rejecting the notion that "equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation," *id.* at 48.

42. 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts criminal statute that prohibited corporate expenditures influencing "the vote on any question submitted to the voters, other than one materially affecting" the property or business of the corporation. *Id.* at 768. The statute specifically stated that referenda on personal taxation did not materially affect corporate interests. *Id.* Rejecting the argument that corporate speech was protected only to the extent that corporate property was involved, *id.* at 778-83, the Court held that the involved corporation's speech on the income-tax referendum at issue would clearly have been permitted to an individual, *id.* at 784-86, and that the state had failed to show sufficient harmful influence by corporations upon the democratic process to deny corporate speech on political issues, *id.* at 788-92. Professor Yudof is of the view that *Bellotti* was decided both correctly and consistently with his theory. M. YUDOF at 162-64.

43. A leading exponent of the theory that it is important to act to ameliorate the effects of wealth on the political process is Judge J. Skelly Wright. See Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). For a well-reasoned presentation of the opposite view, see Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243. Professor Powe is of the view that if wealth breeds inequality of access, then we ought to try to equalize wealth, not limit spending. *Id.* at 282-83. Although wealth equalization is a noble goal, it seems safe to say that no matter how many academic commentators may recommend it, no politically acceptable equalization scheme lurks around a nearby corner. The problem with which Judge Wright has been grappling, and the one that I address in this Review, is what to do while awaiting the redistributive millennium.

44. Several commentators have recently observed an effect on voting patterns linked to corporate speech. See, e.g., Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982); Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COM. L.J. 315 (1980).

### II. THE SECOND THREAT: GOVERNMENT REGULATION OF THE MEDIA

Any strategy designed to resolve the problem of private manipulation of public opinion must be carefully drawn to avoid violating the First Amendment. The difficulty is compounded because it has become common to point to government regulation of the content (or the ownership or almost anything else) of the mass communication media as a powerful threat to that amendment's guaranties of free speech and a free press.<sup>45</sup> Professor Pool's book is in this tradition and is probably the most painstaking and convincing argument yet presented for broad First Amendment protection for the modern electronic media. "The issue of the handling of the electronic media is the salient free speech problem for this decade," he warns.<sup>46</sup> Unless we act to secure the freedom of the electronic media, we will end up "ask[ing] in puzzlement where protections of the free press have gone."<sup>47</sup> And although Professor Pool does not say so in as many words, he clearly agrees with all those who have asserted that the freedom to speak is essential to American-style democracy.<sup>48</sup> If through over-regulation by government we lose that freedom, then our democracy, too, must die.

Despite the "polemical view" mentioned earlier that freedom of this kind is an illusion,<sup>49</sup> the last part of Professor Pool's argument seems intuitively correct. The point is old, even trite, but not without force, that freedom of speech is more important than a guaranty of enough to eat, because without the first, there may be no way to let anyone know if the second is violated.<sup>50</sup> And Professor Pool is certainly correct when he notes that governmental regulation of the content of speech—even electronically

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45. See, e.g., Bazelon, *The First Amendment and the "New Media"*—*New Directions in Regulating Telecommunications*, 31 FED. COM. L.J. 201 (1979); Polsby, *supra* note 10; Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967). The current chairman of the Federal Communications Commission has expressed roughly the same view. See Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). For a recent and cautious effort to see the other side of the argument, see Kaufman, *Reassessing the Fairness Doctrine: Should the First Amendment Apply Equally to the Print and Broadcast Media?*, N.Y. Times, June 19, 1983, § 6 (Magazine) at 17.

46. I. POOL at 10.

47. *Id.* at 189.

48. See, e.g., Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

49. See *supra* pp. 589-90.

50. Arguments of this type would be dispositive in the debate, were it not for the fact that they work the other way too. What good is freedom to speak if one has too little to eat and therefore is incapable of speech? Or, what good is freedom to protest hunger when there is no right to be fed? To whom should the protest then be directed? On the other hand, without freedom to speak, how can one fight for a right to be fed? This is a good game and could continue indefinitely, but it is a little wide of the point. In an ideal world, we would not be forced to choose between the right to speak and the right to eat. Cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 170-86 (1980) (supporting rights to both equal share of "manna" and freedom of expression).

transmitted speech—can constitute a powerful weapon in an evil hand, no matter how beneficent the impulse that originated it. But governmental regulation is not the only threat; domination of the electronic media by the voices of those who can pay the most is also unhealthy for Professor Yudof's pluralist democracy. One of the strengths of Professor Pool's book is that he acknowledges this difficulty and even outlines a strategy for dealing with it—although, as will be seen, his strategy may not be sufficient.

Professor Pool begins by observing that we are moving toward "convergence" of all forms of communication media. Initially, the printing press, the telephone, and the broadcast media all had distinct purposes. Now the distinctions are blurring: Most long-distance telephone traffic is carried by microwaves, that is, it is broadcast;<sup>51</sup> "[s]oon everything that gets printed will exist also in computer form";<sup>52</sup> and so on. That is a natural, even predictable development. But "[t]he extension of electronic means to do better and faster what the older modes of communication did with lead, ink, and paper has inadvertent consequences for the sustenance of freedom."<sup>53</sup> The tradition of freedom for speech and print with governmental regulation of electronic media has continued into the late twentieth century, but it has continued in ignorance of substantial changes in the way the world communicates. The electronic media are swiftly replacing print as the primary means of communication. With the advent of electronic publishing, print as we now know it may soon disappear entirely.<sup>54</sup> At the same time, the development of cable and other new technologies may demolish the scarcity rationale for regulation of the electronic media.<sup>55</sup>

Consequently, as we speed toward the twenty-first century, we are in danger of remaining tied to a tradition protecting a form of speech that no longer exists and a tradition regulating, on grounds that no longer exist, a form of speech that represents the primary means of communication. This paradox will be resolved, Professor Pool asserts, only if we take most of the doctrines that have been used to protect print and the spoken word from government interference and transfer them *mutatis mutandis* to the

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51. I. POOL at 36.

52. *Id.* at 42.

53. *Id.* at 54.

54. *Id.* at 212–17. For Professor Pool, this is an especially important point. When all newspapers are transmitted electronically, whether by satellite or by cable, will the press then fall under the jurisdiction of the FCC? See *id.* at 1. Professor Pool supports total freedom for the electronic press "except where there are elements of monopoly." *Id.* at 219. Exceptions of this kind are vital to Professor Pool's theory, because he wants to defend a form of free access to the electronic media. See *infra* pp. 597–98. For a general discussion of issues raised by government regulation of electronic publishing, see Neustadt, Skall & Hammer, *The Regulation of Electronic Publishing*, 33 FED. COM. L.J. 331 (1981).

55. See *infra* p. 596.

task of protecting electronic communication. This is because in the years to come, the electronic media will perform the functions previously served by the spoken word and the printing press, and it is those functions, not the particular entities that exercise them, that the First Amendment must protect.<sup>56</sup>

To those who follow contemporary constitutional scholarship, this effort to see the modern world as the Framers would have seen it is a familiar move.<sup>57</sup> To ask whether the First Amendment was somehow "intended" to protect the electronic media—to try to see the Framers' world through our eyes—is counter-historical nonsense. The proper question—and the one Professor Pool propounds and answers with his "convergence" argument—is this: In what ways are the electronic media *similar to* the communication media that the Framers sought to shield? For if it can be demonstrated that the electronic media are the contemporary analogues of the media with which the Framers were concerned, then the argument for full protection follows almost as a matter of course.

But the operative word is "almost." Professor Pool implicitly recognizes that the electronic media are capable of exercising over public opinion a degree of power and influence of which the Framers could not have dreamed. Consequently, the direct analogy does not work. Nevertheless, Professor Pool tries to provide the electronic media a degree of protection consistent with democratic ideals. He traces judicial protection of the freedom to speak, to write, and to publish, and he reaches what is surely an uncontroversial conclusion: "[T]he Court has given a wide swath of protection to speech that is conducted in the traditional media of communication."<sup>58</sup> The freedom of these traditional modes of communication has in this country historically been as close to being absolute as any freedom is.<sup>59</sup>

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56. In furtherance of this view, Professor Pool lists at the end of his book ten "guidelines for freedom" that he sees as necessary: (1) "the First Amendment applies fully to all media"; (2) "anyone may publish at will"; (3) no prior restraints, even in the electronic media; (4) "regulation is a last recourse" (and the market is the second to last recourse; his preference is for treating the right to communicate as a free good); (5) government may require "interconnection among common carriers" and "adherence to technical standards, without which interconnection can be difficult"; (6) "recipients of privilege may be subject to disclosure"; (7) "privileges may have time limits"; (8) "the government and common carriers should be blind to circuit use"; (9) "bottlenecks should not be used to extend control"; and (10) "for electronic publishing, copyright enforcement must be adapted to the technology." I. POOL at 244-49. Since these are not the most important parts of Professor Pool's analysis, I give them without comment.

57. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 218-22 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 798-804 (1983); cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977) (distinguishing Framers' "concept" from their "conception").

58. I. POOL at 74. Pool lists the "traditional media" as "print, meetings, parades, associations, and canvassing." *Id.*

59. As Professor Pool recognizes, however, not all speech falls within this "wide swath." See *id.* at 66-74. The Supreme Court has over the years listed categories of speech that are entitled either to less

If the ideal in these traditional media has been total protection for the right of the speaker or writer to be heard or read, the degree of freedom offered to those who transmit their words by modern electronic means of communication has fallen significantly short of that goal. It is possible to put aside for the moment the telephone system and what is left of the telegraph system,<sup>60</sup> because these are common carriers which, in return for receiving a virtual monopoly on the mode of communication the system employs, have traditionally been required to transmit the messages of anyone who is willing and able to pay the fare. A kind of content regulation exists under federal law, but it is aimed at the user and not at the carrier.<sup>61</sup> Common carrier status, moreover, is aimed at promoting freedom to communicate, not at restraining it. If the telephone system, for example, is a "natural monopoly"—and this is the popular view<sup>62</sup>—then only an enforced common carrier status will result in the system's serving every user at reasonable cost.<sup>63</sup>

More important for Professor Pool's argument, as well as for the analysis I shall shortly present, is the regulation of the other electronic communication media, particularly the broadcast industry. In most countries, as Professor Pool points out, the broadcast industry is operated solely or primarily by the government.<sup>64</sup> The United States, however, chose to permit private ownership and operation of broadcast properties, subject to regulation in the public interest.<sup>65</sup> The original rationale for regulation was spectrum shortage: It simply was not possible for everyone who wanted to

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protection or to no protection at all. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (commercial speech entitled to less protection); *Miller v. California*, 413 U.S. 15 (1973) (obscenity entitled to no protection). But Pool's main point is well taken.

60. Professor Pool tells the sad tale:

[W]ith the decline of telegraphy and the growing cost of messengers, Western Union has been forced to rely on the postal service and AT&T for its delivery system. Mailgrams, which by 1977 exceeded telegrams in words sent by a factor of five, go by teletype to a post office near their destination for delivery from there by the postal service. Ordinary telegrams are now mostly phoned. The sender of a telegram from Boston to New York dials a Boston phone number but is connected to a clerk in a Western Union office in New Jersey. The clerk transcribes the text and phones it to the New York addressee. The system is an anachronism.

I. POOL at 43.

61. See, e.g., 18 U.S.C. § 844(e) (1976) (prohibiting use of telephone to convey threat to use explosives); 47 U.S.C. § 223 (1976) (prohibiting obscene or harassing telephone calls). The constitutionality of § 223 was sustained against First Amendment challenge in *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978). The restrictions placed on the carriers themselves are more along the lines of 45 U.S.C. § 83 (1976), which prohibits a telegraph operator (or, for that matter, a railroad) from turning away a customer who is willing to pay.

62. Modern communication technology has thrown this proposition into dispute. See I. POOL at 36-37, 219-23.

63. The dream of providing a telephone for every household has apparently not been fulfilled. See *Most City Poor Said to Depend on Pay Phones*, N.Y. Times, July 27, 1982, at B1, col. 6 (two-thirds of New York City's poor do not have residential phones).

64. I. POOL at 109-12.

65. *Id.* at 112-13. "The alternative of a government monopoly was never seriously considered in America." *Id.* at 112.

broadcast to do so, and as a consequence, the government was forced to decide not only *who* would be allowed to use spectrum space, but also *how* the users would be prevented from using their space to manipulate public opinion.<sup>66</sup>

Although there is a tendency on the part of industry representatives to act as though the nation has opted for a regime of censorship and intrusive government regulation, the truth is somewhat different. Over the years, government regulation of broadcast content has been tailored toward making the broadcaster a hybrid—part autonomous speaker, part common carrier.<sup>67</sup> The much maligned “public trusteeship” doctrine reflects a view of broadcaster as common carrier; the panoply of First Amendment rights protecting the core of the broadcaster’s message permits enormous autonomy. The compromise may be less than perfect, but it is plainly a compromise. There is little regulation of content, although a broadcaster may sometimes be punished for imposing on its audience grossly offensive material that the listeners neither expect nor desire to hear.<sup>68</sup> The Fairness Doctrine and the Equal Opportunities Doctrine have obviously meant less freedom for broadcasters to control every word that goes over the air, but they are in keeping with the image of broadcasters as a kind of common carrier: Although a broadcaster need not carry all speech, when it carries speech that affects public opinion on controversial matters of public policy, it must present more than one side.<sup>69</sup>

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66. *Id.* at 113–19. The Supreme Court officially embraced the concept of spectrum scarcity in *NBC v. United States*, 319 U.S. 190 (1943):

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

*Id.* at 226.

67. Broadcasters would vigorously dispute the claim that they are in any part common carriers. Enforced common carrier status, the argument runs, would violate the First Amendment by requiring them to transmit speech they would prefer to ignore. The First Amendment, they would say, stands as an absolute bar against *requiring* anyone to let someone else use his or her facilities to speak. But that argument is not quite to the point. Broadcasters are not always common carriers. They become quasi-common carriers, for a limited purpose, at the moment that they run political or other programming giving rise to someone’s right of reply. Thus they are *in part* common carriers because they are required to carry *some* messages which they would prefer not to.

There is no reason to think that the First Amendment would have barred imposition of full common carrier status on the operators of communication systems, which are, after all, what broadcasters are. The First Amendment did not, for example, bar the imposition of common carrier status on the telephone system. First Amendment protection runs, if at all, only to the creators of the messages to be sent. Similarly, had the broadcasters been made full common carriers, the producers of programming would still have enjoyed First Amendment protections. Imposition of common carrier status on broadcasters was in fact considered and rejected early in the century. See I. POOL at 136–38.

68. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

69. The Equal Opportunities Doctrine is embodied in 47 U.S.C. § 315(a) (1976), which requires that any broadcast licensee permitting one candidate for public office to use its facilities must “afford equal opportunities” for other qualified candidates wishing to do the same. The Fairness Doctrine, which may or may not have a statutory basis in § 315, requires licensees to provide reasonable oppor-

Doctrines such as these are, in short, efforts at restraining the enormous power broadcasters might otherwise enjoy to mold public opinion.

For the most part, Professor Pool is critical of these developments.<sup>70</sup> He joins other critics in contending that the market could have allocated scarce spectrum space without the necessity for government intervention.<sup>71</sup> The Supreme Court's 1969 decision in *Red Lion*,<sup>72</sup> sustaining the Fairness Doctrine, was simply wrong in its acceptance of "[t]he notion that nature itself inexorably required the selective licensing of broadcasters."<sup>73</sup> If there ever was real spectrum scarcity,<sup>74</sup> it certainly has not survived the development of cable television. "Spectrum shortage is . . . no longer a technical problem but only a man-made one," Professor Pool asserts.<sup>75</sup> "By the time of *Red Lion* it was technically possible to provide as many channels on cable television as consumers would pay for."<sup>76</sup> Modern technology offers any number of methods for multiplying the number of channels that are available or for adding to the amount of information that can be stored or transmitted per unit time.<sup>77</sup> In other words, only the regulators—and the broadcasters, who want to maintain their oligopoly—block the path to unlimited spectrum capacity.<sup>78</sup>

Cable television should end all this scarcity nonsense, according to Professor Pool. Cable promises practically unlimited capacity.<sup>79</sup> Professor

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tunities for the presentation of conflicting views when the licensee addresses controversial issues of public importance. See B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 141-82 (1976).

70. See, e.g., I. POOL at 130 (power of state has become "weapon manipulated by interested parties to silence their opponents"); *id.* at 135 (difficult to reconcile governmentally imposed requirements with traditional concept of freedom of press). There is irony in Professor Pool's decision to oppose policies that are intended to further what he suggests as the aim of a "policy of freedom": "pluralism of expression rather than . . . dissemination of preferred ideas." *Id.* at 8.

71. I. POOL at 138. For similar arguments, see Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 20-24 (1959); Fowler & Brenner, *supra* note 45, at 210-13, 221-26. For an argument that the market by itself would also do an adequate job of ensuring the presentation of a diversity of opinion, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 546-48 (2d ed. 1977).

72. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

73. I. POOL at 142.

74. "Congress failed to recognize the possible transiency of spectrum scarcity. By the mid-1920's, there was awareness that the progress of technology might eventually overcome the shortage." *Id.* at 114.

75. *Id.* at 151. Professor Pool suggests that other new technologies will also play a role in ending the effects of scarcity, in that programming of various kinds will arise to satisfy public demand. See *id.* at 149-50. This development will not alleviate the shortage of access.

76. *Id.* at 142.

77. *Id.* at 152-54.

78. For example, a few years ago, the FCC considered increasing the number of radio stations by reducing the bandwidth of each from 10 to 9 kilohertz. See *Inquiry Concerning 9 kHz Channel Spacings for AM Broadcasting*, 44 Fed. Reg. 39,550 (1979) (requesting comments on proposal). The proposal was abandoned, Professor Pool says, because "[t]he broadcasters objected; they did not want more competitors." I. POOL at 152; cf. *Channel Spacing for AM Broadcasting*, 46 Fed. Reg. 56,214 (1981) (terminating rulemaking proceeding and extensively discussing costs without mentioning competition).

79. Professor Pool partly blames the FCC for the scarcity of broadcast spectrum space and argues that its jurisdiction should be interpreted as narrowly as possible in order to prevent implementation



Pool recognizes that a fear of the power of broadcasters and a desire to ensure fairness are among the major motivations for regulation of broadcast content.<sup>80</sup> He also concedes that left to its own devices, a cablecaster might not welcome all users onto its system, in turn spoiling the vision of limitless capacity.<sup>81</sup> But the answer to that, he says, is for cities to make cablecasters act as common carriers and to require each cablecaster to construct a system with far more channels for "leased access"—that is, available to whoever is willing to pay—than the cablecaster itself plans to use.<sup>82</sup> This way, there will always be additional capacity available if someone has a message to convey.<sup>83</sup> Through this and other innovative means, Professor Pool believes, the cities can ensure citizen access to cable without running afoul of the First Amendment.<sup>84</sup>

This is a sticky point with First Amendment absolutists. Since Jerome Barron's call for a right of access to the media<sup>85</sup> was decisively rejected by the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*,<sup>86</sup> the tendency in the literature has been to dismiss the notion that the public has any "right" to have its views aired in the media. Professor Pool seems troubled by the *Tornillo* result: "Barron's argument in *Tornillo* was not dismissible lightly."<sup>87</sup> Professor Pool's own view is apparently of the "no alternative voices" school—when the owner of the local communication medium has a virtual monopoly, some right of access ought to exist.<sup>88</sup>

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of policies that would result in similar scarcities in cable. See I. POOL at 160-66. He recognizes, however, that the Supreme Court has permitted the FCC to exercise some jurisdiction over cable. See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

80. See, e.g., I. POOL at 119 (radio in 1920's "often looked upon as a potentially more dangerous instrument [than publishing] which could, without vigilance, destroy American ideals"); *id.* at 5 (regulation "a natural response" to proliferation of "great oligopolistic networks" of broadcasters).

81. *Id.* at 168.

82. *Id.* at 166-67, 186-88. Most cable television regulation is currently undertaken by the licensing authority, which is usually the city or county where the cable system operates or will operate. That may change, however, should legislation now working its way through Congress become law. See BROADCASTING, Oct. 3, 1983, at 36; Multichannel News, Nov. 7, 1983, at 3.

83. I. POOL at 188.

84. This strategy would do nothing to alleviate another risk: Even as more communication is shifting to cable, regulatory authorities are shying away from trying to guarantee that adequate cable reception be made available to all at reasonable costs. See Dean & Schmuckler, *Unfair Cable TV Prospects*, N.Y. Times, Aug. 29, 1983, at A19, col. 3. In any event, the FCC's recent decision to preempt local regulation of satellite master antenna television (SMATV) systems, see BROADCASTING, Nov. 14, 1983, at 60, casts doubt on whether cable operators will be able to provide anything close to universal service. Cable operators had counted on local authorities to prohibit SMATV systems in the lucrative apartment market, thus allowing cable operators to cross-subsidize cable installations in the less profitable home market.

85. See, e.g., J. BARRON, *supra* note 6; Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

86. 418 U.S. 241 (1974) (law giving subjects of some newspaper stories a right of reply held unconstitutional). Professor Pool is careful to remind the reader that Professor Barron himself argued and lost *Tornillo*. I. POOL at 133.

87. I. POOL at 238.

88. In particular, his view that some regulation of electronic publishing is appropriate when the publisher holds a monopoly, see *supra* note 54, is explicable in no other way. See also I. POOL at

Although not lacking defenders, this view is outside the First Amendment mainstream.

I do not want to get into this dispute too deeply, but I will note that the Framers of the First Amendment could not have dreamed that anyone would exercise over the democratic process the power held by those who will control the flow of information in the emerging electronic world. This qualitative distinction between electronic media and print weakens the strict analogy necessary to demonstrate the full protection hypothesis. Professor Pool believes that his proposal for freedom from regulation stands or falls on this point,<sup>89</sup> and he is very probably correct. He foretells the end of the scarcity rationale, but it will fall only if cable and other new technologies really do usher in a new era. If there is more of the same—domination of the flow of information, and thus of public debate, by those who can afford to pay the price—then the scarcity rationale will persist, no matter what remarkable technologies tomorrow may bring. Worse (from the point of view of those who advocate deregulation), as the growing electronic networks become the most important means of communication, pressures will grow for regulation based not on scarcity alone, but also on the degree of power exercised by those who control the network.

Professor Pool's convincing argument that total freedom in cablecasting depends on general access to the medium is important for advocates of free speech in the electronic media, but it is also useful in trying to resolve the difficulties left over from Professor Yudof's analysis. Those with different degrees of wealth really do have different degrees of access to the media of communication, which is one reason that Professor Pool expresses a rather forlorn hope that the right to communicate can somehow be made into a free good.<sup>90</sup> His book contains any number of reminders on the persistence of this inequality throughout history.

For example, in discussing the history of the freedom to print, Professor Pool writes: "Freedom of the press, like free speech, basically meant that individuals could express themselves. *Obtaining access to the needed resources was no strain on ingenuity.* All the government had to do was keep hands off; if it did so, motivated individuals would be able to publish their views."<sup>91</sup> This is a common argument, but no matter how frequently it has been repeated, it was never really true. Of course "obtaining access to the needed resources" could place a strain on ingenuity, at least for

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238-40 (natural monopolies may necessitate treatment as common carriers); *id.* at 246-47 (common-carrier status better than public ownership or regulation).

89. "The problem of access may become the Achilles heel of what could otherwise be a medium of communication every bit as free as print." I. POOL at 166.

90. *Id.* at 246.

91. *Id.* at 11 (emphasis added).

those with little income or wealth. Those with sufficient money have always been able to purchase access; those without it have had to rely on the civic virtue (read "charity") of the publishing community.

More important, as Professor Pool's own historical argument makes plain, this situation has worsened over time. The rise of each new form of technology has led to further inequalities in access. The government has routinely permitted private exploitation of each new form of communication.<sup>92</sup> The market, in turn, has done what it is supposed to do—it has rationed a scarce resource. By the late nineteenth century, it was already too late to pretend that space to transmit one's message through that day's mass media was anything but scarce. Those with money or a message that would sell could indeed take advantage of the marvels of what then passed for modern technology. Those with unpopular messages to send—or those without basic civil rights (most Americans in the nineteenth century)—had no significant access.<sup>93</sup>

The technological convergence that Professor Pool identifies can only make these problems worse. As more and more of our communication becomes electronic, standing on the street corner and handing out leaflets may become an increasingly pointless means for getting an idea across. And yet that is the archetypical means through which people with no money begin their protests. In the world that is rushing at us so swiftly, the minimally necessary tool will be not a photocopying machine or a printing press, but a computer terminal or home computer linked to the emerging electronic networks. The major battle of the welfare state in the late 1980's or early 1990's will almost certainly be over whether the federal government should absorb the cost of providing terminals to every household, much as, through rate regulation, the government has traditionally tried to spread the cost of providing every household with a telephone.<sup>94</sup>

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92. For example, the publishing industry began its expansion when the profit motive was introduced. *Id.* at 14. In the United States, the magazine publishing industry was aided by the growth of brand-name advertising and by favorable government action on postal rates. *Id.* at 20.

93. The rise of the electronic media only exacerbated this situation. "For the general public in a democratic country [a] high priority was broadcasting for mass audiences." *Id.* at 26. The airwaves were free, and as the real cost of receiving equipment fell, nearly everyone could have first radio, then television, to snatch from the air the signals that were broadcast for public consumption. The only signals available to be snatched, of course, were those for which there was a market. The poor man's *transmitter* was the telephone, because although that device, along with the radio and later, the television, became the communication equipment of the masses, only the telephone permitted its user to *send* a message. Using the telephone alone, it would be nearly impossible for a user to enlist significant support for a political program or ideology. Radio and television, in contrast, were from the start technologies through which the user could only *receive* messages. And the user, though not quite captive, is usually passive; he will hear only what those who control the airwaves wish to tell him. The airwaves, in turn, are controlled undemocratically according to a system intended primarily to make money.

94. This latter enterprise has apparently failed. *See supra* note 63.

Professor Pool, to his credit, does not ignore these difficulties, and his argument for imposition of common carrier status on cablecasters seeks to resolve a part of it.<sup>95</sup> But unless the right to communicate can really become a free good of some sort—and I readily confess my doubts—then his proposals will not be enough. Like Professor Yudof, he has treated the power of government as the major enemy. There is no question that the government has powers that it can use to subvert the democratic process, but it is simply wrong to pretend that government alone can do so. The question, then, is what can be done, consistent with the First Amendment, to limit the power of private entities to do the same thing.

### III. GROPING FOR DEMOCRACY

Self-government, as I said earlier, requires access to the information needed for the task. We are moving into a world, however, in which information is controlled increasingly by those who are not totally disinterested in the outcomes produced by the system. This concentration of media control in a few hands, and the wealth-based differences in degree of access, have concerned commentators for years.<sup>96</sup> Moreover, the electronic media change the very nature of democracy. When all news was conveyed through print, vast segments of the American public were informed poorly or not at all. In theory, that lack of information provided a rationale for representative democracy, that is, for the election of representatives to make decisions. The electronic media, however, package their news into neat segments of a few dozen seconds per issue. Having watched or heard this “news,” vast segments of the population now consider themselves well informed and, as a result, expect their representatives to follow direct instruction on every issue. Representatives are no longer elected because they are wise, but because they are right, and notions about which positions are the right ones are crucially shaped by the media. Solutions to all these problems have been proffered, but each in the end has run up against the First Amendment barrier.

Perhaps there is finally a way around it. Professor Pool’s work provides the first step. For while he argues vigorously that the electronic media must be protected by the First Amendment, he does not contend that a right of access of some sort would violate that amendment—at least not when “elements of monopoly” exist.<sup>97</sup> The free flow of information is too important, he seems to be saying, to let it be determined on the basis of

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95. See *supra* pp. 597–98.

96. There can be no question that this concentration has enabled those who control the media to limit or prevent transmission of messages with which they disagree. Professor Pool chronicles numerous incidents of restrictions of this kind. I. POOL at 119–29.

97. See *supra* note 54; pp. 597–98.

ability to pay. If he is right (which I assume for the sake of this argument), then this one idea—that the electronic media are *not* sacrosanct—can help us as we grope for ways to rescue democracy.

Professor Yudof's arguments provide the next step. He did not intend that his analysis of the danger of government power to manipulate information and falsify majorities be applied to private attempts to do the same thing. But these two types of manipulation present similar dangers. For every case in which the government has tried to shape consent, any number of private interests have tried to do the same. At nearly every point in his analysis, his arguments remain just as compelling if the word "government" is replaced by the words "powerful private interests." So if there are good reasons to try to protect the democratic process from the undue influence of the government, then there are equally good reasons to protect that process from the undue influence of those whose only claim to power is that they have money to spend.

Professor Yudof's argument has less to do with an assumption that government will always try to manipulate consent, or that it will usually succeed when it does try, than with a realization that the government has so many opportunities to manipulate consent that a mechanism should be created to prevent it from doing so. Much the same can be said about the concentration of access to media—and thus, ultimately, to the public mind—in the hands of powerful private interests. The problem is not that those interests will always try to manipulate the public, and it is not that when they do try they will always succeed.<sup>98</sup> Rather, the problem is that opportunities for manipulation abound.

Perhaps the best example is the amount of money available to large corporations seeking to mount media campaigns to change the public's mind on a given issue. There is evidence of the success of these campaigns,<sup>99</sup> and indeed, were they doomed to failure, then it is not clear why rational corporate managers would waste money on them. Yet under the Court's decision in *Bellotti*, it is not easy to see what can constitutionally be done to control this power.<sup>100</sup>

Much of this might be counterbalanced if commercial television showed any real commitment to public affairs programming. But stories without a market (like newscasters without a market<sup>101</sup>) will in the long run be

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98. Professor Lowenstein's careful study of the effect of "one-sided" spending campaigns on California ballot initiatives suggests that it is easier for those with money to *defeat* a particular initiative than to *enact* one. See Lowenstein, *supra* note 44, at 511, 542-47.

99. See *supra* note 44. Even without the evidence, the proposition that leads to Professor Yudof's analysis—that the *possibility alone* is dangerous—would still carry considerable force, given the enormous inequality in access that money can buy. See *supra* note 14.

100. See *supra* note 42.

101. Surely the dismissal of newscaster Christine Craft because of her age, her appearance, and

crowded out. The networks view their obligation not as informing the public, but as making money.<sup>102</sup> So disasters, murders, wars, and the occasional man-bites-dog story dominate. Political campaigns are frequently covered as though the incumbent were the only candidate.<sup>103</sup> Those who challenge deeply entrenched interests are treated as freaks or ignored.<sup>104</sup>

All of this is important because it helps demonstrate that many private interests either can or do use the electronic and other mass media to try to manipulate public opinion in any number of ways. The manipulation may be either gross or subtle. Professor Yudof, for example, concedes that popular support for the corporate liberal state must arise through a socialization process of some kind;<sup>105</sup> surely the mass media in general, and the electronic media in particular, play a key role in the socialization. And yet message space in the mass media is reserved for those whose messages are unthreatening and those who can afford to purchase access (who are also probably unthreatening). Those whose causes are unpopular may be made heroes on the evening news if their causes appeal to the producers or directors, villains or buffoons if they do not. In general, those involved in the production of news—for all that they might enjoy occasionally lashing out at the bad guys—tend to share the values of the system that affords them their power. These are the individuals who determine whether the views of dissenters are “newsworthy.” That places enormous power in a small number of hands, because for most of those who espouse unpopular views, that is the only airtime they will ever get. As a rule, they cannot afford to purchase any, and unless they stage large demonstrations—or even riots—they are not likely to find themselves invited even to appear

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her on-screen failure to act deferentially toward men suggests that television news is in the entertainment business, not the journalism business—if there was ever any doubt. See N.Y. Times, Aug. 11, 1983, at C20, col. 5 (analyzing this point).

102. For general discussions of the relative success (or lack of it) of television in keeping the public well informed, see M. SCHUDSON, *THE NEWS MEDIA AND THE DEMOCRATIC PROCESS* (1983); Robinson, *Television and American Politics: 1956-1976*, PUB. INTEREST, Summer 1977, at 3. Professor Schudson accepts on faith that television reporters (and those who work through other media) want to keep the public informed, but he expresses doubts about whether they do a good job. Professor Robinson is of the view that although television definitely has had an impact on political preferences, it is not easy to predict what that impact will be, and as a consequence, intentional manipulation of preferences is not easy. Certainly most Americans believe that television (and other media) exercises considerable influence. See S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 204-05 (1981) (citing poll results).

103. See M. SCHUDSON, *supra* note 102, at 14-19.

104. For example, it cannot seriously be asserted that any debate on the role or morality of capitalism is carried on in the electronic media. The value of capitalism, and indeed, of the system as it now exists, is assumed; when errors are exposed, the call is for reform, not revolution. One need not believe that revolution is the appropriate path in order to see that a marketplace in which only some ideas are presented is not truly free. If the liberal state is truly better than the alternatives, then it can surely handle the ideological competition. If on the other hand the liberal state cannot handle the competition—if most people really would become convinced by arguments on the other side—then why isn't that an argument in favor of presenting them?

105. See *supra* p. 588. I assume that this support is not innate.

on late-night talk shows.<sup>106</sup> If, as Professors Yudof and Pool apparently agree, free and open debate on issues of public importance is necessary for the healthy functioning of a democracy, then as the power to shape opinion (or to decide which opinions are heard, which amounts to the same thing) is concentrated in fewer hands,<sup>107</sup> the democracy may grow less and less healthy.

I say "may" because Professor Yudof could be right: It is possible that the wealth-based differentials in access to the media pose no serious threats to his pluralist ideal. But the opportunities for that abuse abound, and it is not too hard to imagine ways in which they could be seized. To take just one example, some years ago a science-fiction writer (whose name irretrievably escapes me) came up with a story about a conspiracy among the major television networks to make the public believe that something had happened that had not. The writer noted the futility of governmental denials appearing only in the newspapers—which fewer and fewer people are reading.<sup>108</sup> Could it happen? Possibly not, but suppose that it did.<sup>109</sup> Would it really be the case that the First Amendment would bar any attempt to keep the small number of people who control so much of the flow of information from doing so much damage?

The example can be made more concrete. The FCC has lately been considering whether to renew the license of a radio station in Kansas that broadcasts virulently racist propaganda, calling for the ambush and murder of black and Jewish people.<sup>110</sup> Many civil libertarians have taken the difficult decision to support the station's right to be racist, and it may be

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106. It is frequently emphasized that television coverage was crucial to civil rights efforts in the fifties and sixties, because the brutality with which segregation was defended entered the nation's living rooms and forced people to confront what was happening. The tragedy, of course, is that brutality, rioting, and death were necessary before the mass media would seriously entertain the issue. Those who incited violence may even have done so in an effort to draw media coverage. See D. LANGE, R. BAKER & S. BELL, *MASS MEDIA AND VIOLENCE* 91-93 (1969) (vol. 9 of *The Report to the National Commission on the Causes and Prevention of Violence*).

107. This phrasing is perhaps a bit inexact; it does not really matter *how many* people control access to information. It matters far more *what values* they share. If television and cable networks are generally operated by individuals who share a fundamental commitment to the preservation of the system, then the result is much as it would be if the networks were all owned by the same people. This is a point that advocates of "structural diversity," see Bazelon, *supra* note 45, seem to overlook. Assuring what on the surface appears to be diverse ownership will not assure diverse views. Unfortunately, there is no way to control content but to control content. If in all circumstances that is unconstitutional, then there is no way to control content at all. But see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (sustaining restrictions on broadcast content); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine).

108. See *San Antonio Papers Defy U.S. Trend*, N.Y. Times, July 5, 1982, at 17, col. 1 (noting general downward trend in newspaper circulation).

109. It is useful in this connection to recall what happened when just *one* radio network broadcast Orson Welles's reading of *The War of the Worlds* on October 30, 1938. See J. FURNAS, *STORMY WEATHER* 141-44 (1977) (describing panic of listeners). See generally H. CANTRIL, *THE INVASION FROM MARS* (1940) (incident provides insight into psychology of panic).

110. See *BROADCASTING*, May 30, 1983, at 54.

true that the station's broadcasts will not in fact lead to any ambushes or murders. But suppose every station in the community, or in the state, or in the country, decided to broadcast similar propaganda. Are we so confident in ourselves and our fellow citizens that we are willing to assert that there would be no effect? And if there would be an effect—if public opinion might be molded—would the government have no right to step in and protect the members of the groups against whom public opinion was being stirred?

A final, somewhat farfetched example might involve the development of a perfect device for hypnosis. This device would be capable of sending to home television screens a signal that, once observed by the viewers, would completely strip them of their will to resist whatever information or instructions were sent along. Does the First Amendment really mean that the government is helpless in the face of such a device? And if the example seems too absurd to be useful, consider the television industry's voluntary restrictions on the use of subliminal suggestion and the government's restrictions on the content of advertising.<sup>111</sup>

A libertarian friend of mine frequently responds to such hypotheticals as these with a shrug and adds: "Then the good guys lose"—the implication being that it is better to lose in this fashion than to have the government strip away basic rights. But perhaps the good guys need not lose. All of these examples involve blatant attempts to manipulate consent, the evil of which Professor Yudof warns. The only reason the manipulation is possible is our decision to permit the control of information—which is surely the life's blood of any democracy—to become concentrated in a small number of hands, hands whose owners may not always have the public's interest in mind. The First Amendment is intended to promote the free discussion of public policy, not to permit special interests to manipulate that discussion or prevent it from taking place. I wish we lived in a world in which we could treat the First Amendment as an absolute bar to government regulation, but I fear that we do not. Our technology is passing the Constitution by.<sup>112</sup>

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111. The *Television Code* banned subliminal suggestion in advertising. NAT'L ASS'N OF BROADCASTERS, *TELEVISION CODE* Program Standard IV-12, at 7 (22d ed. 1981). Although the *Code* is no longer in effect, broadcasters generally retain informal restrictions on the use of the technique.

Neoclassical economists traditionally have tried to explain advertising by arguing that it gives consumers additional information. See Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974). Much regulation of advertising seems to assume, however, that consumers are affected by something other than the information content. For example, Federal Trade Commission regulations prohibit the misleading use of the word "free" even when the reader or viewer would be unlikely to be taken in. See 16 C.F.R. § 251.1 (1983). Similarly, the FTC prohibits endorsements of products unless the endorser is stating his or her true opinion. See 16 C.F.R. § 255.1 (1983). Regulations of this kind assume that advertising appeals to something other than the recipient's intellectual faculties.

112. Cf. G. GILMORE, *THE AGES OF AMERICAN LAW* 65 (1977) ("Rapid technological change unsettles the law quite as much as it unsettles people.").



But solutions, as I said, are not easily found. A first step—and a very minimal one at that—would be to retain the Fairness and Equal Opportunities Doctrines, which the FCC now wants repealed.<sup>113</sup> Not only should these guaranties of access be continued, but they should be enforced against cable operators as well.<sup>114</sup> To the extent that a cablecaster, like a broadcaster, is part autonomous speaker and part common carrier, expansion should not be barred by the First Amendment; as Professor Pool points out, if absence of scarcity is to be the rationale for abandoning regulation, then absence of scarcity must first exist. In addition, perhaps the guidelines on public service programming, guidelines the FCC has recently viewed with indifference,<sup>115</sup> should be retained and expanded, in the hope—and it is little more than that—that broadcasters and cablecasters might make use of this enforced opportunity and transmit for public view a real debate.

These solutions would not completely eliminate the opinion-molding power of wealth. It may be that a Yudof-style injunction against corporate spending would be appropriate when the court was able to make the same findings that Professor Yudof would require before determining that government was falsifying consent.<sup>116</sup> *Bellotti* and *Buckley v. Valeo* stand as partial obstacles to an approach of this kind,<sup>117</sup> but constitutional decisions, fortunately, are altered more easily than is the Constitution itself. Corporate spending to influence public opinion need not be eliminated completely. But it should be treated like other commercial speech, meaning that it can be limited, both in content and in form, to further vital state interests.<sup>118</sup> Surely among the interests that would qualify for this description is the interest in preserving democracy.

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113. See BROADCASTING, Aug. 8, 1983, at 66; TIME, Nov. 21, 1983, at 58. The substance of these doctrines is explained at *supra* note 69. I would not propose extending these doctrines to encompass the print media, but that may be a result of my own indoctrination with particular values.

114. Technically, these access guaranties already apply to cable operators. See 47 C.F.R. § 76.205 (1982) (Equal Opportunities Doctrine); *id.* § 76.209 (Fairness Doctrine). The FCC, however, has not sought to enforce them against cable operators. See Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 9 FORDHAM URB. L.J. 163, 216 n.215 (1982).

115. The requirement that broadcasters "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served," *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1257-58 (1949), originated as part of the Fairness Doctrine. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969) (Fairness Doctrine requires that "broadcaster must give adequate coverage to public issues"). With a handful of exceptions, this requirement has been enforced, if at all, only in the evaluation of competing applications in the comparative renewal process. See, e.g., Chamberlin, *The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion*, 31 FED. COM. L.J. 361 (1979); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137 (1975).

116. See M. YUDOF at 304-05.

117. See *supra* notes 41-42.

118. See *In re R.M.J.*, 455 U.S. 191, 207 (1982) ("substantial state interests . . . will support carefully drawn restrictions" on commercial speech); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979)

A more radical solution (at least by American standards) would be for the government itself, whose awesome power both Professor Yudof and Professor Pool are trying to contain, to get into the mass media business. The government could establish a broadcast or cable network of its own—not an underfunded Public Broadcasting System or National Public Radio. If this government network actually served as a counterweight to the interests represented on commercial broadcast and cable networks, then some degree of diversity might be restored.<sup>119</sup> Professor Yudof proposes restrictions on government-as-editor that would enable Congress to establish such a system with substantial editorial freedom.<sup>120</sup> Professional journalists might welcome the opportunity to work for a well-funded organization without any need to please commercial backers.

But that proposal, while it might help dampen the power of corporate speech, would probably do little to improve access. Access could be improved by the establishment of publicly owned common carrier stations (both for broadcasting and for cablecasting), with the aim of making air time what Professor Pool seems to think it should be—a free good. Time slots could be distributed through a lottery.<sup>121</sup> A proposal of this kind would present practical problems (among them the question whether government ought to subsidize program production for those unable to afford to produce on their own), but there is no reason to fear that the problems would be insurmountable.

Only tradition and inertia stand against proposals such as these; there is no reason to think that the Constitution would be a bar to either.<sup>122</sup>

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(restriction on corporate speech justified to protect public from deceptive use of trade names).

119. The idea of creating a "real" (or "yardstick") publicly controlled network is certainly not new. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 241-42 (citing historical sources). But it would not be easy to ensure that the government's message would be different from what well-funded private interests were already saying. See Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 616 (1980). Thus a better idea might be the establishment of government-owned common carrier stations. See *infra* p. 606.

120. Professor Yudof does not want to prevent the government from ever controlling the speech of its employees. See, e.g., M. YUDOF at 241 ("teacher may not subvert the curriculum under the doctrine of academic freedom"); *id.* at 242 ("[G]overnment should not be disabled by the public-forum doctrine from communicating its messages through media over which it exercises editorial control."). He does propose, however, that when government delegates editorial power over a communication system it controls, then it must respect that delegation and must not interfere with editorial judgment (although the government is free to revoke the delegation entirely and take direct control of the communication system). See *id.* at 241-44 (citing Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974)). In creating the "real" publicly owned communication system mentioned in the text, officials could be made more independent by serving subject to Senate confirmation and for staggered terms, and perhaps by being ineligible to succeed themselves. The Corporation for Public Broadcasting is a good model in some ways, a poor one in others. See Canby, *supra*, at 1149-64.

121. This is Judge Bazelon's position as I understand it. See Bazelon, *supra* note 119, at 241-42.

122. I am assuming here that the delegation of editorial authority would eliminate the dangers of which Professor Yudof warns. Should the government act through its station to try to manipulate the flow of information, then litigation to enforce Professor Yudof's principle would be the appropriate response.

Moreover, either of the two might move commercial networks, frightened by the competition or by its prospect, to be more conscientious themselves.

It may be that the reader, having persevered to this point, remains unconvinced that any of these proposals is a good one. It may also be that none of them would work. But as long as we insist on our conceit, that the people are governed by their own consent, then it is our obligation to take what steps we can to preserve the freedom of that consent. Consent, like the public debate that ought to precede it, requires information. Professor Yudof has given us fair warning that it is possible to manipulate the flow of information and the mechanisms of consent. If nothing is done about the influence of the mass media and the different degree of access that wealth can buy, then as we move into Professor Pool's electronic world, we may be doomed to face manipulations of this kind. The manipulator, however, will not be Uncle Sam, but rather those with the money to spread their messages—Uncle Sam's Big Brothers. In short, unless we act to stop our slide, we will continue downward toward the New First Amendment, with its guaranties of freedom of speech for those who can afford it, and freedom to listen for those who cannot.

